

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

77-1308

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,
Appellee,
against

EUGENE COREY,
Defendant-Appellant.

PETITION FOR REHEARING AND
PETITION FOR REHEARING-EN BANC
BY EUGENE COREY

IRVING ANOLIK
Attorney for Defendant-Appellant
225 Broadway
New York, N. Y. 10007

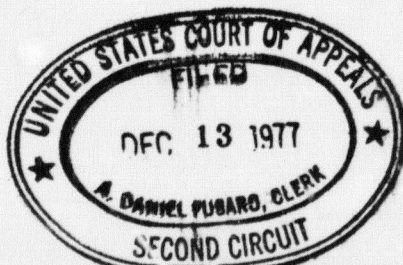


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UNITED STATES COURT OF APPEALS
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Docket No. 77-1308
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UNITED STATES OF AMERICA,

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-against-

EUGENE COREY,

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PETITION FOR REHEARING AND
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BANC BY EUGENE COREY

TO THE HONORABLE CIRCUIT JUDGES SMITH, MANSFIELD and OAKES:

EUGENE COREY, the defendant-appellant herein,
respectfully presents this petition pursuant to the Rules
of this Court, wherein he is seeking a rehearing in
connection with the order of this Court rendered the 30th
day of November, 1977, affirming the judgment of the United
States District Court for the Southern District of New York,
(Constance Baker Motley, J.), convicting COREY of wire fraud,
mail fraud and conspiracy to defraud appellant's employer
(18 U.S.C. §§ 1343, 1341 and 371).

In the event this Panel denies a rehearing, or the present determination is adhered to, then Petitioner respectfully requests that this petition be submitted to all the active Circuit Judges for determination en banc.

BACKGROUND OF THE CASE

The prosecution was predicated upon the testimony of two accomplices, Barney and Krasner, who supplied business forms to Hartz Mountain Corporation, Petitioner's employer at that time.

The evidence indicated that COREY had accepted kickbacks from these suppliers and had cooperated in short shipments and overbilling by these suppliers.

REASONS FOR GRANTING
THE PETITION FOR
REHEARING

I. This Court, in its opinion, obviously concedes that error was committed, but, for some reason, further opined that the error was not serious enough to warrant reversal. We respectfully maintain that this Panel of the Court overlooked certain aspects of the case and predicated its decision upon erroneous assumptions.

1. First off, the assumptions by this Court that the defendant did not question the sufficiency of the evidence (Slip Opinion 586) is incorrect, since at page 28 of COREY's brief upon the original appeal he states:

"While it is our position that the Government did not even prove its case and that the Court should have granted the Rule 29 motion to dismiss . . ."

Additionally, COREY's Point III indicates that there were multiple conspiracies established, if any were established at all. This, however, is not the most serious error of the Court.

2. This Panel, after reviewing the fact that the Government introduced evidence that was at least 16 years old, that COREY had allegedly been dismissed from his previous employment at Columbia Broadcasting System (CBS) for falsifying his W-2 form and overtime hours record, nevertheless concludes that the error was "harmless" (Slip Op. 589). We maintain that the error was substantial and not harmless.

The testimony of Barney and Krasner was largely responsible for the conviction of COREY. Both of these individuals were accomplices, as a matter of law, and consequently their credibility was suspect, to say the least.

The Government obviously felt it was crucial to its case to establish that COREY had done something dishonest in the past, in order to dispel the testimony which he ultimately gave, that he had no knowledge whatsoever of these wrongdoings, and that as a Vice-President he was completely detached from and unaware of the shipping room and the contents of any particular shipment. Moreover, it was not his duty to determine whether or not billings were correct or incorrect since there were other departments in Hartz Mountain that had control over this. COREY categorically denied that he had done any of these misdeeds.

Were it not for the CBS incident, we submit that there may very well have been an acquittal.

The Court declares that the case against COREY was very strong, but we question this assertion since if it was so strong, why in the world did the Government go through such great pains to bring in the CBS issue?

For some reason this Court is convinced that error was committed, but yet goes through a great deal of soul-searching and rationalizing to come up with the conclusion that the error was harmless.

It is obvious that this Panel was very troubled by this case and, as a matter of fact, went out of its way to note that the Government, in actuality, misled the defense counsel who had inquired as to whether or not it intended to go beyond COREY's employment at Hartz. This Court noted that the Government "may have played it a bit close to his chest". (Slip Op. 588)

To assume that the error with respect to CBS was not substantial, or, to put it another way, to state that it was highly probable that the error did not contribute to the verdict, is completely inconsistent with a reading of the record and the facts.

3. This Court totally overlooked the fact that defense counsel specifically asked the Government whether or not it would attempt to prove "other crimes" that COREY may have committed. The events that allegedly occurred at CBS were crimes and, consequently, the Government did not detail any of these items, despite the specific request therefor. In its oral argument, the Government used a rather casuistic argument that it assumed that when defense counsel inquired about "other crimes", it meant convictions. This was not even treated by the Court herein.

4. Unfortunately, a case such as this gives the Government a great deal of incentive to play things close to the vest and to be less than candid.

In MESAROSH v. UNITED STATES, 352 U.S. 1, 9, the Supreme Court aptly declared that ". . . the Government of a strong and free nation does not need convictions based upon such testimony."

This Court must bear in mind that COREY paid by check in virtually all instances in his dealings with Krasner. There was no corroboration of any cash that he ever received from Barney.

To say that the case therefore was "strong", is just at war with the facts. Both Barney and Krasner had the strongest motives in the world to lie because they had pleaded guilty and hoped to help themselves by aiding the Government.

During oral argument and at the trial, the Government admitted that it was wrestling with the question of whether to divulge the CBS incident because of the requests made by defense counsel, and after a conference among Assistant United States Attorneys, decided not to do so. It is patent, therefore, that the Government was well

aware of the importance to their case of the CBS incident and that they made a calculated determination to run the risk of reversible error by using it.

The Government should not play cases "close to the chest". It is unbecoming to do this. Unfortunately, this Court has now lent great encouragement to such tactics.

In UNITED STATES v. ARCHER, 486 F.2d 670, this Court condemned, in obiter dicta, tactics that the Government used and, indeed, might very well have reversed had there not been another reason for reversing on a jurisdictional basis.

In COOLIDGE v. NEW HAMPSHIRE, 403 U.S. 443, the Supreme Court of the United States noted, citing BOYD v. UNITED STATES, 116 U.S. 616, 635:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices, get their first footing in that way, namely by silent approaches, and slight deviations from legal modes of procedure. . . ."
(Emphasis ours).

In COPPEDGE v. UNITED STATES, 369 U.S. 438, the Supreme Court aptly explained and cautioned: (id at 449):

"When society acts to deprive one of its members of life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged".
(Emphasis ours)

This Court apparently was straining to find a way to affirm the conviction because it harked back to a rather hackneyed, although valid, observation from JONES v. UNITED STATES, 262 F.2d 44, 48 (4 Cir.), cert. denied 359 U.S. 972 (1958), indicating that the "perfect trial, from the prosecution or the defense standpoint, is as rare as the perfect crime." This Court continues and concludes its decision and opinion by saying "We detect no error of sufficient prejudicial magnitude to require reversal."
(Slip Op. 592)

It is manifest throughout this opinion that this Court has found error in several aspects.

5. We ask this Court to re-read the brief of the appellant, from pages 6 through 20, to note just how "cute" the prosecution really was in this case. In its opinion herein, this Panel refers to the fact that there was no

bad faith in the prosecutor eliciting the fact that COREY was obviously Jewish, by bringing out the fact that his original name was Cohen. At 470 of the record, the prosecutor asked right out:

"Q. Mr. Corey, your name used to be Cohen; correct?

"A. Yes."

The prosecutor blurted out the fact in his question that COREY's name used to be Cohen. He made no effort to determine whether or not COREY had changed his name at any point in time coinciding with the CBS incident. All the resources of the Government certainly could have determined that the name change occurred years and years prior to the CBS incident. For this Court to now condone this sort of tactic and say that there was no bad faith and to accept a post-argument letter that it was inadvertent, indicates that this Court has had the wool pulled over its eyes.

It is manifest that this Court has been hoodwinked by what has occurred herein and has not taken full cognizance of the gravity of the errors perpetrated.

When the defense counsel agreed with the Court that it would be more prejudicial for the defendant to let it drop, that is the name change, it was not because of the fact that

the defense counsel was pleased with Judge Motley's ruling. It was because the prejudicial effect was so tremendous, that something had to be said. It would have been far better if the matter had never come up. It was merely an effort to salvage something, because no matter what was said, the jury had already heard it. Thus, this Court's footnote number 6 that defense counsel agreed with Judge Motley, completely overlooks the import of the error and bespeaks a complete and erroneous interpretation of what occurred. The defense counsel was trying to, in some way, attenuate a very serious and prejudicial error which had occurred and was faced with the Hobson's choice of ignoring it or permitting some sort of explanation which merely emphasized in the jury's mind that this man was either ashamed that he was once Jewish or for some reason had changed his name because of the fact that he could no longer remain a Jew.

Whatever it was, for this Court to assume that that was merely some trifle and that it was in essence a wonderful thing that it happened, because Judge Motley permitted an explanation, is absolutely naive.

We would suggest that rather than looking back at JONES v. UNITED STATES, supra, a 1958 case in the Fourth

Circuit, to justify the affirmance of this case by reflecting on the fact that it is difficult to ever find a perfect trial, we would hope that this Court would look a little bit further back to BERGER v. UNITED STATES, 295 U.S. 78 (1935), where the Supreme Court of the United States said:

"It is as much his duty to refrain from improper methods calculated to produce wrongful convictions as it is to use every legitimate means to bring about a just one."

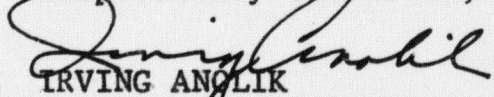
This referred to improper conduct by a prosecutor.

We urge this Court to review its opinion and decision in the light of the foregoing circumstances.

We ask this Court to take cognizance of the fact that there was error in this case of a substantial nature and not something merely de minimus.

II. In the event that this Panel ultimately adheres to its original position, we then ask that this petition be circulated among all the active Judges of the Circuit for a determination en banc.

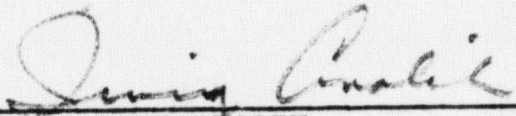
Respectfully submitted,


IRVING ANOLIK
Attorney for Petitioner-
Appellant.

CERTIFICATION OF GOOD FAITH:

I, IRVING ANOLIK, attorney for petitioner-appellant,
and a member of the bar of this Court, certify that this
petition for rehearing and for rehearing en banc is made
in good faith and not for the purpose of delay.

DATED: New York, New York
December 9, 1977.



IRVING ANOLIK

Copy served by mail 12/12/77 upon
U.S. Attorney, Southern District of
New York.

Beatrice L. Stahl

Secretary to Irving A. K.
Attorney for Petitioner